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ABSTRACT

This paper highlights the utility of the "third wave" of school equity cases that began to take shape subsequent to funding cases. These cases challenged the adequacy of public education systems, as measured not only by funding, but by educational content and other factors. The cases attempted to create a concrete mandate for an adequate education by adopting the lofty aims of the education clauses of state constitutions. The paper discusses the development of a theory that there is a right, derived from certain state constitutions, to an adequate education. It goes on to examine the standards used to evaluate the adequacy of education in public school systems to determine whether an "adequate education" is being provided. Next, it looks at remedies adopted by different states to promote adequacy (Kentucky, Texas, Massachusetts, and New Jersey). It also notes the provisions of the No Child Left Behind Act of 2001, federal legislation that may provide parents and concerned third parties with additional tools to force failing school districts to take action to improve student performance, focusing on: state standards and testing; increased public awareness of school performance and parents' understanding of their children's performance; increased accountability; strengthening teaching methods and teacher quality; funding flexibility; and targeting underperforming schools. (SM)

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Education: Federal Rights and Racial Equity, Adequacy, and Standards in K-12 Education

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EXECUTIVE SUMMARY

Since the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education*, the federal courts have created a jurisprudence establishing racial equality in education as vitally important to the sanctity of the Fourteenth Amendment. However, in the intervening half-century, courts have generally limited the federal interest in educational equality to issues surrounding the effectiveness of desegregation efforts, rather than recognizing a more comprehensive set of rights, such as funding equity or the adequacy of education provided to all students. Consequently, parents and interest groups frustrated with the quality of public education turned to state constitutional provisions as alternative sources of protection. At first, the cases brought focused solely on the issue of equitable state funding of public education, with little regard for the quality of education provided by such funds. Subsequent to these funding cases, a so-called "third wave" of school equity cases began to take shape. These cases have challenged the adequacy of public education systems, as measured not only by funding, but by educational content and other factors.

The third wave of school financing litigation challenges the substantive adequacy of the instruction provided by certain state public education systems. These cases attempt to create a concrete mandate for an adequate education by adopting the lofty aims of the education clauses of state constitutions. According to the proponents of the third wave cases, such education clauses establish the foundation for the states' responsibility to provide "efficient" or "adequate" public education. It is then up to the courts of those states to determine the minimum requirements that the state must meet in order to provide an education system that comports with state constitutional requirements. The greater the definition given to the issue by the legislature in the first instance, the more the judiciary will have to enforce.

As the Kentucky Supreme Court has declared, "courts may, should, and have involved themselves in defining the standards of a constitutionally mandated educational system." In determining whether a public education system has failed to meet the minimum level of adequacy required by state constitutions, courts have examined many factors, including: (1) school accreditation; (2) quality of facilities; (3) quality of curriculum;(4) number of teachers and staff members; (5) the quality and quantity of textbooks, supplies and equipment; (6) provision of transportation to and from schools; (7) drop-out and graduation rates; (8) student preparedness for the workforce; and (9) national and regional ranking of schools. Different states have focused on different criteria. In some states, the most important factor has continued to be how closely per-pupil spending in poor school districts compares with the levels in wealthier districts. In other states, the primary concern is with the content of the education itself.

Cognizant of issues related to comity and separation of powers, once it has been determined that a school system has failed to satisfy key criteria for an "adequate" or "efficient" education system, state courts have generally turned to state lawmakers to develop a system that passes constitutional muster. Spurred on by the third wave cases, educational equity has improved in the states reviewed below, which has led to some improvement in the substantive education received by the states' schoolchildren. What remains to be seen is how these minimum standards, as articulated by legislation and compelled by courts, can be used in litigation designed to assure that all students receive an equal educational opportunity.

In conjunction with the "third wave" of constitutional challenges to the adequacy of education and subsequent state legislation and regulation, a new federal law, the No Child Left Behind Act ("NCLB Act"), may provide parents and concerned third parties with important new tools to force failing school districts to take action to improve student performance. The NCLB Act requires the states to establish educational standards – standards that have already been adopted in some jurisdictions as the basis for future education adequacy litigation in much the same way as education clauses in state constitutions fueled the third wave cases. It remains to be seen whether such litigation would be limited to actions against local or state entities.

The NCLB Act was signed into law on January 8, 2002. It included five basic education reform principles: (1) requiring states to create education plans that include standards for what a child should know and learn in each grade and testing to determine whether students progress toward those standards; (2) increasing public awareness of school performance by requiring public reporting of state education standards and test scores; (3) providing parents a variety of tools to hold schools that continually fail to make adequate progress toward meeting the standards accountable; (4) improving teacher quality and emphasizing teaching methods with a proven track record; and (5) providing states with greater flexibility to determine the allocation of federal education grants.

INTRODUCTION*

Since the U.S. Supreme Court's 1954 decision in *Brown v. Board of Education*,[1] the federal courts have created a jurisprudence establishing racial equality in education as vitally important to the sanctity of the Fourteenth Amendment.[2] However, in the intervening half-century, courts have generally limited the federal interest in educational equality to issues surrounding the effectiveness of desegregation efforts, rather than recognizing a more comprehensive set of rights, such as funding equity or the adequacy of education provided to all students.[3] Consequently, parents and interest groups frustrated with the quality of public education turned to state constitutional provisions as alternative sources of protection.[4] At first, the cases brought focused solely on the issue of equitable state funding of public education, with little regard for the quality of education provided by such funds.[5] Subsequent to these funding cases, a so-called "third wave" of school equity cases began to take shape. These cases have challenged the adequacy of public education systems, as measured not only by funding, but by educational content and other factors.[6]

This paper will focus on the utility of the "third wave" cases, discussing: (1) the development of the theory that there is a right, derived from certain state constitutions, to an "adequate education;" (2) the standards used to evaluate the adequacy of education in public school systems to determine whether an "adequate education" is being provided; and (3) the remedies adopted by different states to promote adequacy. This paper also touches on the provisions of the No Child Left Behind Act, new federal legislation that may provide parents and concerned third parties with additional tools to force failing school districts to take action to improve student performance.

I. BACKGROUND

A. The Third Wave and "Educational Adequacy"

The third wave of school financing litigation challenges the substantive adequacy of the instruction provided by certain state public education systems. These cases attempt to create a concrete mandate for an adequate education by adopting the lofty aims of the education clauses of state constitutions. According to the proponents of the third wave cases, such education clauses establish the foundation for the states' responsibility to provide "efficient" or "adequate" public education.[7] It is then up to the courts of those states to determine the minimum requirements that the state must meet in order to provide an education system that comports with state constitutional requirements. The greater the definition given to the issue by the legislature in the first instance, the more the judiciary will have to enforce.

As the Kentucky Supreme Court has declared, "courts may, should, and have involved themselves in defining the standards of a constitutionally mandated educational system."[8] In determining whether a public education system has failed to meet the minimum level of adequacy required by state constitutions, courts have examined many factors, including: (1) school accreditation; (2) quality of facilities; (3) quality of curriculum;(4) number of teachers and staff members; (5) the quality and quantity of textbooks, supplies and equipment; (6) provision of transportation to and from schools; (7) drop-out and graduation rates; (8) student preparedness for the workforce; and (9) national and regional ranking of schools.[9] Different

states have focused on different criteria. In some states, the most important factor has continued to be how closely per-pupil spending in poor school districts compares with the levels in wealthier districts.[10] In other states, the primary concern is with the content of the education itself.[11]

Cognizant of issues related to comity and separation of powers, once it has been determined that a school system has failed to satisfy key criteria for an "adequate" or "efficient" education system, state courts have generally turned to state lawmakers to develop a system that passes constitutional muster.[12] Spurred on by the third wave cases, educational equity has improved in the states reviewed below, which has led to some improvement in the substantive education received by the states' schoolchildren.[13] What remains to be seen is how these minimum standards, as articulated by legislation and compelled by courts, can be used in litigation designed to assure that all students receive an equal educational opportunity.

B. What Remedies Exist?

With regard to the third wave court decisions, "winning in the courtroom is not the same as winning in the classroom."[14] After a victory in the courts, the state legislatures remain responsible for fashioning and enacting remedies that are responsive to both judicial and public concerns. Only with a strong legislative remedy are state legislatures able to meet the goal of educational adequacy, as required by state constitutions. Without a strong legislative remedy, further litigation may be required to assure that the goal of educational adequacy is met.

To this end, states can, and have, implemented a number of different remedies, sometimes applying multiple remedies. These remedies are primarily intended to address persistent inequalities in the education provided to students, which has remained a key factor in evaluating the adequacy of education systems despite the growing concern with improving the substantive quality of education. The third wave cases differ from earlier funding cases because equitable funding is considered a means to achieving a high quality education, not just a goal to be achieved for its own sake. Thus, state courts have begun to evaluate proposed remedies with an eye towards whether such funding would be sufficient to achieve specific educational goals.

Many potential remedies to funding inequities have been developed by state legislatures, including: (1) the full state funding method, whereby the state legislature allocates a certain amount of money to spend per pupil and either state funds or a combination of state and local funds are used; (2) a flat grant, where the state legislature determines an amount to be allocated by unit, *e.g.*, by student, by school, by classroom; and (3) consolidating school districts and tax bases.[15]

Some states have used what is known as a "foundation" program. A foundation program establishes a minimum or a "floor" for state education expenditures that districts must impose in order to receive state aid. If revenues from the imposition of such taxes do not reach the "floor" level, then the state gives the locality the difference between the funds raised and the "floor" level, provided that such funds are earmarked for education alone.[16] Under this approach, a district that is able to raise more money than the floor is allowed to keep the additional money for its own educational program.[17] While this process ensures a minimum funding level for education statewide, it does not end disparities in educational funding because wealthier districts

are able to keep the benefit of any surplus revenues, giving school districts incentive to increase taxes in wealthier districts.[18] By contrast, in poorer districts where the tax base cannot provide sufficient revenues to meet the tax floor, spending never rises above the tax floor. The higher the floor is set, the greater the chance that a "foundation" program can alleviate financial disparities between municipalities.

Establishing a guaranteed tax base, or "GTB," is a similar method of raising funds. The GTB system guarantees a reasonable property tax base for districts to tax. The state does this by "paying" the tax to a poorer district on the difference in the actual property value of the district and the GTB.[19] This system only funds districts with per-pupil property values less than the GTB. This approach differs from the foundation approach because no minimum tax is established. While there are some advantages to a pure GTB approach, it inevitably favors wealthier districts because, again, these districts can raise taxes more easily, which leads to more revenue.[20] Many states incorporate aspects of both the foundation and GTB approaches to accommodate the needs of the particular state.

Still other states require surplus funds collected by wealthier communities to be redistributed evenly across all the state school districts. This "recapture" of funds ensures that all of the schools in the state receive equal funding. The benefit of this system is that the state education system is treated as a whole, and districts that may not otherwise receive that level of funding will do so.[21]

Despite the many legislative remedies proposed, it is clear from an analysis of the states in which third wave litigation has been pursued thus far that fashioning an appropriate solution to a given state's educational adequacy concerns is more art than formula.

II. STATE COURT RESPONSES TO DEFICIENT EDUCATION SYSTEMS

A. Kentucky

Kentucky is often considered the model state for school education reform. The case *Rose v. Council for Better Educ., Inc.*, signaled the beginning of the third wave of education of cases, and has been used as a guidepost for similar litigation in a number of other states.[22]

In Kentucky, the General Assembly is constitutionally mandated to "provide an *efficient* system of common schools throughout the state."[23] The plaintiff in *Rose* alleged that the education financing provided by the General Assembly was inadequate, and that there was an over-reliance on local revenues. As a result, the plaintiff argued, the funding protocol resulted in "inadequacies, inequities and inequalities throughout the state so as to result in an inefficient system of common school education," in violation of the education clause of Kentucky's state constitution.[24] The trial court agreed, finding that the Kentucky Constitution requires that the state maintain a school system with "substantial uniformity, substantial equality of financial resources and substantially equal educational opportunity for all students."[25] Because the state failed to meet this requirement, the trial court held that the school finance system was unconstitutional and discriminatory.[26]

The Kentucky Supreme Court affirmed this decision, relying heavily on the legislative history of the education clause of the Kentucky Constitution.[27] The legislative history included a

report of the 1890 debate in the General Assembly that led to the enactment of the education clause. During this debate, a Kentucky delegate stated that a public school system should be a "system of practical equality in which the children of the rich and poor meet upon a perfect level and the only superiority is that of the mind," and that the state must therefore "seize every opportunity to make [public schools] more efficient."[28] Based in part on this legislative history, the Kentucky Supreme Court determined that education is a fundamental right.[29]

Upon a detailed evaluation of the specific shortcomings of Kentucky's public school system, the court found that it failed to reach minimum standards of efficiency. In discussing the problems inherent in the Kentucky school system and affirming the trial court's decision that the system was unconstitutionally inefficient, the court noted that "achievement test scores in the poorer districts are lower than those in the richer districts. . . [s]tudent-teacher ratios are higher in the poorer districts," and that there was a "substantial difference in the curricula offered in the poorer districts. . . particularly in the areas of foreign language, science, mathematics, music and art."[30] The court also compared the education system in Kentucky to other states and found that Kentucky was "ranked nationally in the lower 20-25% in virtually every category that is used to evaluate educational performance."[31] In its region of eight states, Kentucky ranked: (1) sixth in per pupil expenditures; (2) seventh in the "use of property taxes as a percent of sources of school revenue;" (3) seventh in the percentage of ninth grade students that eventually graduate from high school; and (4) seventh in pupil-teacher ratio.[32]

The court concluded that, in order for a school district to meet the Kentucky Constitution's requirement of an "efficient system of common schools," the districts must provide each and every child with, at a minimum, the following seven substantive capacities: (1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (4) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (6) sufficient training or preparation for advanced training in either an academic or vocational field so as to enable each child to choose and pursue life work intelligently; and (7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[33]

Although the Kentucky Supreme Court identified such elements as consistent with an efficient and adequate education system, it deferred judgment to the legislature on what curriculum, governance and funding levels would be required. In direct response to the seven factors articulated in *Rose*, the Kentucky legislature enacted the Kentucky Education Reform Act of 1990 ("KERA"), which was intended to promote reform in the areas of curriculum, governance and finance.[34]

As to funding, KERA implemented a foundation approach to establish a floor for the state-wide education expenditure per pupil. This floor is determined by the state legislature and re-evaluated every two years.[35] Each district must raise a minimum tax rate of 30 cents per $100 of assessed property value. The state then contributes the difference to any district that fails to

reach the base tax level.[36] Additionally, KERA utilizes a two-tiered revenue generating system. A Tier I district can levy additional taxes of no more than 15% of the base funding level, and keep all of the revenue from these taxes in that district.[37] If a district with property wealth of 150% below the statewide per-pupil assessment elects to participate in Tier I, the district can also receive equalization funds. Tier II allows districts to raise additional taxes over 30% of the base funding level, but will not receive equalization funds from the state.[38] Tier II is intended to act as a revenue cap to diminish disparities between districts, but because the wealthiest districts are exempt from Tier II, critics claim that Tier II does not fulfill that purpose.[39]

KERA also brought changes to the curriculum and education governance. Ambitious learning goals were created, and many new education and governance programs were created and funded under KERA. Every school now has a school-based management council that consists of the principal, two parents elected by the school's parents, and three teachers elected by the school's teachers. The creation of these councils gave local schools an important role in decision-making, including the ability to create policies with respect to curriculum, textbooks, instructional practices, staff assignments, discipline, and the school budget.[40] KERA also funded extensive professional development, performance-based assessments, and an accountability system of rewards and sanctions.[41] In addition, KERA emphasized that all teachers increase instruction in advanced content, critical thinking, writing and application of knowledge.[42] The increased funding provided by KERA was matched by a mechanism to put that funding to good use through shifting education governance to local schools, emphasizing the substance of education deemed most important, and providing teachers and principals with incentives and professional development opportunities to make it happen. The Kentucky General Assembly continues to monitor the education system in order to make modifications when necessary to continue education improvement in the state.[43]

B. Texas

In 1989, the same year as the *Rose* decision, the Texas Supreme Court found that the Texas public education system did not fulfill the constitutional requirement that the state school system provide an "efficient" education.[44] The case of *Edgewood Indep. School Dist. v. Kirby* was brought by school districts, parents and students to invalidate Texas' school financing system as unconstitutionally inequitable.[45] In evaluating the claim, the court first looked to the language of the educational clause of the Texas Constitution, article VII, section 1, which provides that "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an *efficient* system of public free schools."[46] As in Kentucky, the Texas court looked to the legislative history behind the state education clause. Statements from the Constitutional Convention of 1875 noted that "[o]ther delegates recognized the importance of a diffusion of knowledge among the masses not only for the preservation of democracy, but for the prevention of crime and for the growth of the economy."[47] The court also relied on historical notes to determine that the term "efficient" included an equitable component.[48] On this basis, the court found that the requirement of an "efficient system of public schools" required equality in education funding across the state.[49]

The *Edgewood* court held that Texas' public education financing, with its strong focus on property tax, did not ensure an efficient education for all schoolchildren because the system

failed to address the differences in revenue raising ability among districts.[50] As a result, the court found the financing system to be unconstitutional. The court focused on access to state funds as a critical component of determining whether a state is providing an adequate education, noting that: (1) "[c]hildren who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds;" and that (2) Texas's Education Code stated that "a thorough and efficient system be provided. . . so that each student. . . shall have access to programs and services. . . that are substantially equal to those available to any similar student, notwithstanding varying economic factors."[51] The court then determined that if the financing system did not fairly distribute funding, an adequate education would be impossible to achieve.[52]

After the *Edgewood* ruling, the state legislature made several unsuccessful attempts to produce a system that passed constitutional muster. It was not until 1995 that the Texas Supreme Court blessed a legislative solution to the problems identified in *Edgewood*.[53] Prior to *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.* (*Edgewood III*), the second legislative remedy deemed unconstitutional by the Texas Supreme Court, the range in per pupil spending varied from $2,112 per pupil to $19,333 per pupil, solely depending on the wealth of each school district.[54] After several successful legal challenges, the Texas legislature enacted a two-tier program, which was upheld by the state courts. In this system, the first tier is a foundation program, in which the state requires 86 cents to be assessed by each school district for every $100,000 of property in that district; poorer districts then receive a guaranteed minimum level of funding per pupil.[55]

The second tier uses a GTB program, where districts may choose to levy up to 64 cents per $100,000 in addition to the minimum rate.[56] The state will then fill the gap between the amount of money funded by the district and the level it would be if the property value per student was $249,500. If a district's per-pupil wealth is greater than $249,500 and less than $295,000, it does not get state funding, but retains any revenue collected over the GTB.[57] The third tier has a GTB specifically earmarked for new facilities.[58]

Texas is unique in that it also utilizes a "Robin Hood" program, whereby wealthier districts are required to share funding with poorer districts.[59] A district can do this by: (1) consolidating with another district; (2) detaching property; (3) purchasing attendance credits from the state; (4) partnering with another school district; or (5) consolidating the tax base with another district.[60] While this system, as its nickname indicates, is one of the more progressive funding schemes, it has come under intense political fire, and it remains to be seen if it will be maintained by Texas.[61]

To complement the increase in funding, the Texas legislature also provided measures to improve the substance of education. School districts are now required to create a long-term district curricula improvement plan. Such a plan will give guidance to the school districts on how to spend the increased funds to improve educational programs, although districts do not have to justify expenditures to the state.[62] Accountability measures also were added, including requiring school districts to develop end-of-course exams, and to publish an annual campus report card describing the performance of its students.[63] The legislation further required the Texas Board of Education to promulgate academic indicators to measure the quality of

learning.[64] While Texas looked at improving the substance of education as well as the funding, it did not tie educational development to receiving aid.[65]

C. Massachusetts

As did the courts in Kentucky and Texas, Massachusetts courts put a premium on understanding how Massachusetts's education clause came into being.[66] In *McDuffy v. Secretary of the Executive Office of Education*, the Massachusetts Supreme Court relied on the relevant constitutional provision in holding that "'the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish. . . public schools and grammar schools in the towns' includes the duty to provide an adequate education to the young people of the State, and that this duty is 'an enforceable obligation of the Commonwealth.'"[67] Massachusetts focused on the views of the author of the education clause in the Massachusetts Constitution, John Adams, who said that "the preservation of the means of knowledge among the lowest ranks, is of more importance to the public than all the property of all the rich men in the country."[68] In addressing the issue of funding, Adams said, "laws for the liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant."[69]

Subsequent to the holding in *McDuffy*, the Massachusetts legislature instituted an approach, similar to the one used in Kentucky, to remedy disparities in education funding by instituting the Massachusetts Education Reform Act of 1993 (MERA).[70] MERA requires that the legislature determine the appropriate per-pupil expenditure, and then has each district make a minimum contribution.[71] The state makes up any difference between a district's contribution and the mandated per-pupil expenditure.[72] Although Massachusetts established a "floor" for education funding, unlike Kentucky, Massachusetts imposes no ceiling on the revenue wealthy school districts can raise.[73] As a result, the disparities between wealthy and poor districts are likely to increase as time goes on. Massachusetts also does not account for differences between school districts, *e.g.*, calculating the book and equipment allotment without considering the wealth of the districts.[74]

MERA, like KERA, also looked to improve the substantive state of the Massachusetts education system, in addition to the financing. It created a governance structure to move control and responsibility to the local schools.[75] Performance assessments were created to determine the effect of the change in funding and the adequacy of the education being provided.[76] Similar to KERA, MERA also included sanctions as an incentive to meet the testing standards of Massachusetts.[77] Also, in Massachusetts, every school is required to participate in professional development programs, and in a new certification process.[78] Moving the control to the local schools has resulted in increased funding to curriculum enrichment, textbooks, new equipment, and supplies, as well as increased hiring of professional staff.[79] Thus, the finance reform complemented substantive education reform in order to provide the level of education required by the Massachusetts Constitution.

D. New Jersey[80]

The New Jersey Constitution of 1947 provides that "the Legislature shall provide for the maintenance and support of a thorough and *efficient* system of free public schools for the

instruction of all the children in the State between the ages of five and eighteen years."[81] In *Abbott v. Burke*, students from poorer school districts brought a claim alleging that the education system required by the constitution was not being provided to them as required by the Public Schools Education Act of 1975 (the "Act").[82] According to the *Abbott* court, the Act and the rules promulgated by the State Board of Education defined a thorough and efficient education as including the: (a) establishment of educational goals at both the state and local levels; (b) encouragement of public involvement in goal-setting; (c) instruction intended to produce the attainment of reasonable levels of proficiency in a student's basic communications and computational skills; (d) a breadth of program offerings designed to develop the individual talents and abilities of pupils; (e) programs and supportive services for all pupils, especially those who are educationally disadvantaged or who have special educational needs; (f) adequately equipped, sanitary, and secure physical facilities and adequate materials and supplies; (g) qualified instructional and other personnel; (h) efficient administrative procedures; (i) an adequate state program of research and development; and (j) evaluation and monitoring of programs at both the state and local levels.[83]

The *Abbott* court held that the Act was unconstitutional because it did not create a sufficient monitoring function to ensure that an adequate education was provided on a statewide level.[84] The court further found that the procedures set forth in the Act failed to measure the quality of the education provided to students.[85] Moreover, the court noted, the enactment of statutes and regulations designed to establish a thorough and adequate education did not fulfill the state's constitutional obligation.

According to the court, the legislature must work to "assure funding of education in poorer urban districts at the level of property-rich districts; that such funding cannot be allowed to depend on the ability of local school districts to tax; that such funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational needs of poorer urban districts in order to redress their extreme disadvantages."[86] More broadly, the New Jersey education system must give students "opportunities that will equip them in their roles as citizens and competitors in the labor market."[87] Significantly, the court found that "adequacy" meant the "achievement of the thorough and efficient level in every district" [88] and acknowledged that "[w]hat a thorough and efficient education consists of is a continually changing concept."[89]

As in Texas, the New Jersey Court focused on the way schools were funded, specifically noting that poorer municipalities could not raise their property tax rate any higher because the increase in the rate would cause a decrease in property values. According to the court, this would end up decreasing the total amount of tax dollars that could be collected – referred to as the "municipal overburden" – preventing districts from raising sufficient funds.[90]

In examining the quality of education in poorer urban school districts, the court found "significant inferior quality."[91] Thus, New Jersey's "constitutional mandate has not been satisfied [due to] the absolute level of education in those [poorer] districts and the comparison with education in affluent suburban districts."[92] Significant disparities in the quality of education between wealthier and less affluent school districts were noted in the areas of: computer training,[93] quality of science equipment,[94] foreign language instruction,[95] music instruction,[96] art instruction,[97] physical education,[98] and educational facilities.[99] Historically strong indicators of

education quality – such as student-teacher ratios, the average experience of instructional staff, and the average level of teacher education – all indicated that the level of education in the poorer districts was neither adequate, nor comparable with the wealthier school districts.[100] Moreover, the factors reviewed by the court do not take into account the fact that poorer districts may need more than just equitable support to maintain an adequate education. The court also recognized other factors such as scores on the High School Proficiency Test,[101] drop out rates,[102] lack of educational resources in the home,[103] and the increased need for counseling services[104] as evidence that "the totality of the [poorer] districts' educational offering must contain elements over and above those found in the affluent suburban district."[105] "A thorough and efficient education requires such level of education that will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution."[106] Based on the totality of the state of the education system, the court concluded that there was no way the system could be found to be adequate.[107]

After several attempts to develop a funding scheme that passed constitutional muster, the New Jersey Supreme Court substantially approved the legislative remedy in *Abbott v. Burke (Abbott V)*.[108] In its 1990 decision, the court required the legislature to ensure substantial equality in funding between the rich and the poorer districts, including providing a level of funding that is "adequate to provide for the special educational needs of these poorer urban districts" and "address their extreme disadvantages."[109] In *Abbott V*, the court approved a number of programs that provided a thorough and efficient education, and directed a number of other changes to bring the educational system to constitutional levels. Assuming that the changes the court required would be made by the legislature, the court stated that this decision would be "the last major judicial involvement in the long and tortuous history of the state's extraordinary effort to bring a thorough and efficient education to the children in its poorest school districts."[110] The remedy accepted by the court included: whole school reform; parity of regular education funding; full-day kindergarten; a minimum of half-day preschool for three and four-year olds; enhanced security; enhanced technology; alternative schools; school-to-work and college-transition programs; and safe, sanitary, and sufficient facilities.[111] With the requirement that funding meet the needs of the districts, the legislature looked to how to provide a substantive education to meet the needs of the districts, and then funded those programs.

III. THE NO CHILD LEFT BEHIND ACT

A. Introduction

In conjunction with the "third wave" of constitutional challenges to the adequacy of education and subsequent state legislation and regulation, a new federal law, the No Child Left Behind Act ("NCLB Act"),[112] may provide parents and concerned third parties with important new tools to force failing school districts to take action to improve student performance. The NCLB Act requires the states to establish educational standards – standards that have already been adopted in some jurisdictions as the basis for future education adequacy litigation in much the same way as education clauses in state constitutions fueled the third wave cases. It remains to be seen whether such litigation would be limited to actions against local or state entities.

The NCLB Act[113] was signed into law on January 8, 2002. It included five basic education reform principles: (1) requiring states to create education plans that include standards for what a child should know and learn in each grade and testing to determine whether students progress toward those standards; (2) increasing public awareness of school performance by requiring public reporting of state education standards and test scores; (3) providing parents a variety of tools to hold schools that continually fail to make adequate progress toward meeting the standards accountable; (4) improving teacher quality and emphasizing teaching methods with a proven track record; and (5) providing states with greater flexibility to determine the allocation of federal education grants.

B. Standards and Testing

The NCLB Act requires states to establish academic standards for children in elementary and secondary schools. The standards must be set forth in a comprehensive education plan (the "NCLB Plan"), and submitted to the U.S. Department of Education by January 31, 2003 for review and approval.[114] In order to be approved by the Department of Education, each NCLB Plan must demonstrate "challenging academic content standards"[115] and "challenging student academic achievement standards."[116]

In determining whether to approve a plan, the NCLB Act requires the U.S. Secretary of Education to consult with a peer-review committee. The peer-review committee must consist of representatives of state educational agencies and local educational agencies who are familiar with educational standards, assessments, accountability, the needs of low-performing schools and other educational needs of students.[117] The Secretary, in consultation with the peer-review committee must approve a plan within 120 days of its submission. If the Secretary determines that the plan does not meet the requirements of the NCLB Act, the state must be given the opportunity to revise the NCLB Plan.

Each NCLB Plan must demonstrate that the State has developed and is implementing a single statewide accountability system that will be effective in ensuring that all local educational agencies, public elementary schools and public secondary schools (middle and high school) make adequate yearly progress ("AYP")[118] in meeting the standards defined in the NCLB Plan. Each state must also establish a timeline for AYP. The timeline must ensure that, by the end of the 2013-14 school year, all students in the school system meet or exceed the State's proficient level of academic achievement.

In order to comply with the plans required under the NCLB Act, each school system must administer tests to measure the progress of students. The tests must include, at a minimum, academic assessments in mathematics, reading or language arts, and science. Beginning in the 2002-03 school year, tests for mathematics and reading or language arts must be administered not less than once during: (1) grades 3-5; (2) grades 6-9; and (3) grades 10 through 12. Beginning in the 2005-06 school year, tests must be administered every year in grades 3 through 8 in math and reading. Beginning not later than school year 2007-08, the proficiency of all students in science must be measured by administration of a test for each student not less than one time during each of: (1) grades 3 through 5; (2) grades 6 through 9; and (3) grades 10 through 12. At least 95% of all students enrolled in the school are required to take the assessments.

C. Increasing Public Awareness of School Performance & Parents' Understanding of Their Child's Performance

The NCLB Act requires state educational agencies to issue a "report card" to notify local educational agencies and the public of the content of student academic achievement standards and academic assessments included in the NCLB Act Plans.[119] The NCLB Act also requires each state and local education agency ("LEA") receiving federal educational funding to prepare and disseminate annual report cards to parents. The report card must provide information regarding whether individual schools are achieving compliance with their NCLB Plans, including a breakdown of test results by gender, migrant status and among students who have disabilities, who are economically disadvantaged, who are from racial or ethnic minority groups or have limited English proficiency.[120] Schools that fail to achieve compliance with their NCLB Plans are identified as requiring improvement on the report card. The report cards also must show professional qualifications of teachers in the state, the percentage of such teachers teaching with emergency or provisional credentials, and the percentage of classes in the state not taught by highly qualified teachers, including a comparison of the statistics for high-poverty compared with low-poverty schools.

Additionally, each school must provide the parent of each student with: (1) information on the level of achievement of the parent's child in each of the state academic assessments; and (2) timely notice that the parent's child has been assigned, or has been taught for four or more consecutive weeks, by a teacher who is not highly qualified.[121]

D. Increasing Accountability

LEAs are required to provide all students enrolled in a school identified for improvement with the option to transfer to another public (including charter) school served by the LEA and not identified for improvement, unless such an option is prohibited by state law. In providing this option, the LEAs must give priority to the lowest achieving children from low-income families. LEAs must expend up to 20% of funds obtained under Title I of the federal Elementary and Secondary Education Act (EDEA) to pay for transportation for students who exercise the option to switch to a school not identified for improvement.

If a school identified as needing improvement fails to make AYP by the end of the first full year after identification for improvement, the LEA must: (1) continue to provide technical assistance to the school and the transfer option to all the school's students; and (2) make tutoring and other supplemental educational services available to eligible low-income children. In addition, the LEA must do <u>at least</u> one of the following: (1) replace the school staff who are identified as responsible for the failure to make AYP; (2) institute and fully implement a new curriculum, including providing professional development for all staff; (3) significantly decrease management authority at the school level; (4) appoint an outside expert to advise the school on its progress toward making AYP, based on its school NCLB Act Plan; (5) extend the school year or school day; or (6) restructure the school's internal organizational structure. Any corrective action taken by a school must be published and disseminated to the parents.

The NCLB Act provides further escalation of each of the corrective action procedures noted above, including complete restructuring of the school, in the event that any particular school repeatedly fails to meet AYP.[122]

E. Strengthening Teaching Methods and Teacher Quality.

The NCLB Act requires that, by the 2005-06 school year, all teachers in schools funded under the NCLB Act be fully certified.[123] Certification is the minimum requirement for teachers. Each state LEA is required to define, under its NCLB Act Plan, what constitutes a "highly qualified teacher" and only hire teachers that meet such criteria.[124]

The NCLB Act also authorizes increased funding to improve the quality of teachers, including funds for: (1) a national teacher recruitment campaign; (2) a national principal and assistant principal recruitment program; and (3) grants to improve knowledge and skills of early childhood educators who work in communities that have high concentrations of children living in poverty. The NCLB Act authorized $4 billion in 2002 to promote teacher quality through training and recruitment.

The NCLB Act places a special emphasis on reading, particularly in grades K-3, and increase the authorized annual funding level for reading programs geared to those grades from $300 million to $900 million.[125]

F. Funding Flexibility

Traditionally, due to funding restrictions, the transfer of federal funds from one program to another is usually prohibited. As a result, states have sought greater flexibility to reallocate federal funds provided under one grant program to other programs that are deemed to be a higher priority.

The NCLB Act addresses such concerns by giving states that meet or exceed the AYP for two consecutive years the ability to transfer up to 50% of their federal funding to other educational initiatives they deem a higher priority, including: (1) teacher quality grants; (2) educational technology; (3) innovative programs; and (4) safe and drug-free schools.

G. Targeting Underperforming Schools

The NCLB Act provides a variety of mechanisms for targeting underperforming schools, including allowing parents the choice to transfer children out of underperforming schools, pushing school districts to establish new charter schools, and providing increased federal funds for tutoring of children identified in low performing schools.

The NCLB Act also provides new opportunities to pursue legal remedies against states and school systems that fail to meet the NCLB Act.[126] For example, parents in New York filed a NCLB Act lawsuit in January 2003 against the Albany and New York City school systems alleging that the parents were not properly notified, pursuant to the NCLB Act, that their children were in poor-performing schools and had the right to transfer out or get extra academic help. The lawsuit also alleges that the school system failed to accommodate parental transfer requests

in a timely basis, as required under the NCLB Act.[127] Potential litigants in California, Illinois, Louisiana and Washington, D.C. are reportedly considering similar lawsuits.[128]

Likewise, the San Francisco Public Law Advocates filed a lawsuit early this year against the California Board of Education alleging that the Board of Education was in violation of the NCLB Act by hiring teachers who did not have teaching credentials as required under the NCLB Act.[129]

This issue, in particular, well illustrates the criticism that has been mounted against the standards established in the NCLB Act: that the NCLB Act sets up a system where schools are likely to be deemed as failing. To the extent that school systems seek to "dumb down" standards in order to comply with the rigors of the NCLB Act, this too could lead to litigation for failing to provide challenging academic content standards and challenging student academic achievement standards.

In spite of this criticism, the NCLB Act unquestionably provides a more definitive benchmark for parents to ascertain the quality of their schools, and take preventive action to help their children obtain a high quality education. It remains to be seen whether this more definitive benchmark will spark a new wave of litigation if and when states fail to meet it, and if this legislation will play a part in shaping future education adequacy claims.

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[1] *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments").

[2] *See Brown v. Bd. of Educ., (Brown II)*, 349 U.S. 294 (1955); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

[3] *See e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Milliken v. Bradley*, 418 U.S. 717 (1974). In *San Antonio*, the U.S. Supreme Court rejected arguments that state school funding schemes violate Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d et seq., and the Fourteenth Amendment on the basis of race or poverty. With that decision, the Court also held that there was neither an explicit nor an implicit federal right to education. Similarly, in *Milliken*, the segregation of urban schools, the Court further cemented the so-called distinction between *de jure* and *de facto* segregation.

[4] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (discussing the authority of states, under their individual constitutions, to provide greater rights than the federal constitution).

[5] The first wave focused on creating equity in education by arguing that the Equal Protection Clause of the federal constitution guaranteed that all children were entitled to equal educational opportunities, and in most cases this meant the same amount of money spent on every child's education. The first wave ended with *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973), when the U.S. Supreme Court ruled that: (1) poverty was not suspect classification and thus Texas's education finance system would not come under strict scrutiny; (2) absolute equality of education financing was not required by the equal protection clause of the United State Constitution; and (3) education was not a fundamental right.
Subsequent to *Rodriquez*, the same basic argument that was made in the first wave under the federal Equal Protection Clause was now being made under state equal protection clauses in a number of states. Plaintiffs in the second wave would often couple the equal protection argument with an argument that the education clauses of the state constitutions also required equality of funding. The success or failure of these claims turned on whether the state would treat either poverty as a suspect class or education as a fundamental right. The results were mixed. *See*

Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 11-21 (Fall 2002).

[6] Judith A. Winston, *Achieving Excellence and Equal Opportunity in Education: No Conflict of Laws*, 53 ADMIN. L. REV. 997 (2002). *See e.g., Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

[7] Even though many state constitutions refer to an "efficient" education, that term has been substituted with "adequate" in the third wave movement. This term comes from the idea that current educational systems are inadequate to provide an efficient public education system. Thus, when addressing the issue of adequacy, one is addressing whether the education system is adequate to meet the constitutional required standard. *See* Erin E. Buzuvis, *"A" For Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 654-55.

[8] *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 210 (Ky. 1989).

[9] *See Rose*, 790 S.W.2d 186; *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Idaho Sch. for Equal Opportunity v. Evans*, 976 P.2d 913 (Idaho 1998); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997).

[10] *See Abbott*, 575 A.2d 359; *Edgewood Indep. Sch. Dist.*, 777 S.W.2d 391.

[11] *See Rose*, 790 S.W.2d 186; *McDuffy*, 615 N.E.2d 516.

[12] *See e.g., Rose*, 790 S.W.2d 186; *McDuffy*, 615 N.E.2d 516; *Abbott*, 575 A.2d 359; *Edgewood Indep. Sch. Dist.*, 777 S.W.2d 391.

[13] *See*, Erin E. Kelly, *All Student Are Not Created Equal: The Inequitable Combination of Property-Tax-Based School Finance Systems and Local Control*, 45 DUKE L.J. 397 (Nov. 1995).

[14] Buzuvis, *supra* note 7, at 633 (quoting Molly S. McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in *Law and School Reform: Six Strategies for Promoting Educational Equity* 88, 107 (Jay P. Heubert ed., 1999)).

[15] Buzuvis, *supra* note 7, at 664.

[16] Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC 1, 16 (Jan. 2002).

[17] *Id.* at 16.

[18] *Id.* at 16.

[19] *Id.* at 17. Thus, if the GTB was $250,000 and a school district's per pupil property value was $50,000, a difference of $200,000, the state would pay the district $200,000 multiplied by the local property tax rate, multiplied by the number of students in the district. If this community had a 2% property tax, they would receive $4,000 per student from the state and raise $1,000 per student through the property tax.

[20] *See id.* at 17. *See also* Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 146 (Helen F. Ladd et al., eds., 1999); ALLEN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 170 (2d ed. 2000).

[21] Kramer, *supra* note 16, at 17

[22] Buzuvis, *supra*, note 7, at 654-55. *See*, *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Ma. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997).

[23] KY. CONST. § 183 (emphasis added).

[24] *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 190 (Ky. 1989).

[25] *Id.* at 191-92.

[26] *Id.*

[27] KY. CONST. § 183. The historical context also played a part in defining Alabama's educational clause. *See Alabama Coalition for Equity, Inc. v. Hunt*, 1993 WL 204083, at *52 (Ala. Cir. Ct. April 1, 1993), *dismissed by Ex parte James*, 2002 WL 1150823 (Ala. May 31, 2002) (holding "that the Alabama constitution's education guarantee is one that accords schoolchildren of the state the right to a quality education that is generous in its provision and that meets minimum standards of adequacy. . . [and] that the state of Alabama has a strong historical commitment to education that it has expressed with increasing force in each of its six constitutions.").

[28] *Rose*, 790 S.W.2d at 205, quoting III DEBATES CONSTITUTIONAL CONVENTION 1890 4460.

[29] *Id.*

[30] *Id.* at 197.

[31] *Id.*
[32] *Id.* The seven other states considered Kentucky's regional neighbors in this comparison are Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, and West Virginia.
[33] *Id.* at 212.
[34] Kelley, *supra* note 13, at 405-406.
[35] Kramer, *supra* note 16, at 24.
[36] Kelley, *supra* note 13, at 405-406.
[37] Buzuvis, *supra* note 7, at 671.
[38] *Id.*
[39] *Id.*.
[40] Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 500 (Oct. 1999).
[41] *Id.* Through the system of accountability, teachers and principals are rewarded or sanctioned based on student achievement, giving incentive to teachers and principals to make progress.
[42] *Id.*
[43] Buzuvis, *supra* note 7, at 672.
[44] *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989).
[45] *Id.* at 391.
[46] *Id.* at 393 (emphasis added).
[47] *Id.* at 395-96. The court also looked at legislative intent in concluding that the 1883 constitutional amendment authorizing local financing "was intended not to preclude an efficient system but to serve as a vehicle for injecting more money into an efficient system." *Id.* at 396.
[48] *Id.* at 396. At the time of the 1876 Constitution, schools were completely state funded on a per capita basis.
[49] *Id.*
[50] Kramer, *supra* note 16, at 28
[51] *Id.*
[52] *Edgewood Indep. Sch. Dist.*, 777 S.W.2d at 392. The *Edgewood* court concluded that "[p]roperty-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves." *Id.* The Kentucky Supreme Court also found that relying heavily on municipal taxes causes the system of education to be inadequate, focusing on the lack of uniformity in tax rate and property tax base from municipality to municipality. *See Rose*, 790 S.W.2d at 199.
[53] *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*).
[54] Kramer, *supra* note 16, at 27 (citing *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (*Edgewood III*).
[55] Kramer, *supra* note 16, at 29, citing TEXAS CENTER FOR EDUCATIONAL RESEARCH, A GUIDE TO TEXAS SCHOOL FINANCE (the "Guide"), at 7.
[56] Kramer, *supra* note 16, at 30.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id. See also* TEX. EDUC. AGENCY, MANUAL FOR DISTS. SUBJECT TO WEALTH EQUALIZATION FOR 2002 – 2003 SCH. YEAR 4 (2002).
[61] Clay Robison, *Bill to Repeal 'Robin Hood' Passes Hurdle*, HOUSTON CHRONICLE, Feb. 5, 2003, *available* at http://www.HoustonChronicle.com.
[62] Kelley, *supra* note 13, at 432-33.
[63] *Id.* at 433
[64] *Id.*
[65] *Id.*
[66] *McDuffy v. Secretary of the Exec. Office of Educ.*, 615 N.E.2d 516, 559-60 (Ma. 1993).
[67] *Id.* at 560 (*citing* Part II, C.5, § 2 of the MASS. CONST.).
[68] *Id.* at 583.
[69] *Id.* at 584.
[70] Buzuvis, *supra* note 7, at 672.
[71] Kelley, *supra* note 13, at 410 (citing MASS. ANN. LAWS CH. 70 § 2 (Law Co. Op. Supp. 1995)).
[72] Kelley, *supra* note 13, at 410 (citing MASS. ANN. LAWS CH. 70 § 2 (Law Co. Op. Supp. 1995)).

[73] Buzuvis, *supra* note 7, at 672-673.
[74] Kelley, *supra* note 13, at 414.
[75] Buzuvis, *supra* note 7 at 673.
[76] *Id.*
[77] Buzuvis, *supra* note 7 at 673.
[78] Kelley, *supra* note 13, at 414.
[79] *Id.*
[80] Education litigation in New Jersey began with *Robinson v. Cahill*, 303 A.2d 273 N.J. (1973), just weeks after the U.S. Supreme Court foreclosed the option of a federal Equal Protection claim in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973). The New Jersey Supreme Court held in this second wave case that the system financing education in New Jersey violated the state constitution, relying on the state constitution's thorough and efficient requirement. *Robinson*, 303 A.2d at 295.
[81] N.J. Const. of 1947, Art. VII, § 4, ¶ 1 (1947); *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990) (emphasis added).
[82] *Abbott*, 575 A.2d at 365.
[83] *Id.* at 390. The court observed that "[t]he Act and the rules of the Board together constitute a thoughtful, well integrated definition of thorough and efficient, described both abstractly and in concrete terms. The standards and goals, when considered in conjunction with the mandated procedures, constitute a potentially practical, workable mechanism for achieving a thorough and efficient education throughout the state." *Id.* at 348, quoting N.J. STAT. ANN. 18A: 7A-5.
[84] The court concluded "that although the monitoring function may have been designed to measure and achieve a thorough and efficient education, in practice it has not accomplished that goal." *Id.* at 392.
[85] Stating that "[w]hile the procedure suggests a certain educational content, there is no standard of the breadth of curriculum that must be offered, no standard of other commonly accepted educational criteria (staffing ratios, faculty experience and training, staffing of special positions and their number), and no broad-gauged standard of performance of any district, school, or pupil apart from the statewide tests." *Id.* at 374.
[86] *Id.* at 363.
[87] *Id.* at 374.
[88] *Id.* at 369.
[89] *Id.* at 367.
[90] *Id.* at 394.
[91] *Id.*
[92] *Id.*
[93] "Each South Orange/Maplewood school has a computer lab," students are introduced to computers in kindergarten and computer education is offered at every education level, with multiple courses offered at the high school level. "Camden can offer formal computer instruction to only 3.4% of its students. . . . In Jersey City, computer classes are being taught in storage closets." *Id.* at 359-60.
[94] "Princeton has seven laboratories in its high school, each with built-in equipment. . . . However, many poorer urban districts offer science classes in labs built in the 1920's and 1930's, where sinks do not work, equipment such as microscopes is not available, supplies for chemistry or biology classes are insufficient, and hands-on investigative techniques cannot be taught." *Id.* at 360.
[95] Many affluent schools systems begin to teach foreign language in elementary school with the opportunity to begin a second language in high school such as French and Spanish, as well as more diverse language such as Italian, Russian, German, and Latin. Many poorer districts do not begin to offer foreign language until high school, some even as late as tenth grade, and with much less variety in language choices. *Id.*
[96] *Id.* at 361.
[97] "In Montclair, the art program begins at the pre-school level; there is an art teacher in every elementary school; every school has at least one art room; and the district has purchased a variety of art equipment, such as a kiln for ceramic artwork. . . .There are no art classrooms in East Orange elementary schools, and art teachers, who must travel from class to class, are limited in the forms of art they can teach." *Id.*
[98] "While many richer suburban school districts have flourishing gymnastics, swimming, basketball, baseball, soccer, lacrosse, field hockey, tennis, and golf teams, with fields, courts, pools, lockers, showers, and gymnasiums, some poorer urban districts cannot offer students such activities. In East Orange High School there are no such sports facilities; the track team practices in the second floor hallway." *Id.* at 362.
[99] "In an elementary school in Patterson, the children eat lunch in a small area in the boiler room area of the basement; remedial classes are taught in a former bathroom. In one Irvington school, children attend music classes

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in a storage room and remedial classes in converted closets. At another school in Irvington a coal bin was converted into a classroom. In one elementary school in East Orange, there is no cafeteria, and the children eat lunch in shifts in the first floor corridor. In one school in Jersey City, built in 1900, the library is a converted cloakroom; the nurse's office has no bathroom or waiting room; the lighting is inadequate; the bathrooms have no hot water (only the custodial office and nurse's office have hot water); there is water damage inside the building because of cracks in the façade; and the heating system is inadequate." *Id.* at 363.

[100] *Id.* at 366-68.

[101] The High School Proficiency Test ("HSPT") is designed to "measure the minimum level of learning needed to go on to more difficult subjects" – in other words, "a prerequisite to, not an equivalent of a thorough and efficient education." *Id.* at 369 "In Newark, for example, only 41% of ninth graders who took the test passed reading, 31% passed math, and 39% passed writing. In the wealthiest districts, 97% passed reading, 93% passed math and 95% passed writing. Statewide, 83% of students tested passed reading, 72% passed math, and 77% passed writing." *Id.* at 370.

[102] *Id.*

[103] *Id.* at 372.

[104] "Educators note that an adequate guidance program could give children in poorer urban districts special assistance and individual attention; that counseling services help children overcome problems associated with unwanted pregnancies, drugs, crime, or unsupportive families; that both crisis counselors and career counselors from elementary school through high school may be needed to assist students to overcome obstacles and receive a worthwhile education." *Id.*

[105] *Id.* at 402.

[106] *Id.* at 403.

[107] "Despite this lack of affirmative proof, have plaintiffs nevertheless proven that whatever that standard may be their districts clearly fall below it? Does the combination of student need, disproportionately present in poorer urban districts, inferior course offerings, dilapidated facilities, testing failures, and dropout rates leave the issue in doubt?" *Id.* at 375.

[108] *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

[109] *Abbott v. Burke*, 575 A.2d 359, 408 (1990).

[110] *Abbott*, 710 A. at 455.

[111] *Id.*

[112] P.L. 107-110.

[113] P.L. 107-110.

[114] All states submitted NCLB Act Plans to the U.S. Department of Education by the January 31 deadline. As of this writing, 35 states have had peer reviews of their state plans, and 45 states have had informal meetings with senior Department officials to discuss their accountability plans. Additionally, as of this writing, seven state plans have been approved by the Department of Education: (1) Colorado, (2) Indiana, (3) Massachusetts; (4) New York; (5) Ohio; (6) Mississippi; and (7) Maryland. For more information, please visit the No Child Left Behind homepage administered by the Department of Education at http://www.nclb.gov/.

[115] Challenging academic content standards must include: (1) specific targets for what children are expected to know and be able to do; (2) coherent and rigorous content; (3) encourage teaching of advanced skills. 20 U.S.C. § 6311.

[116] Challenging student achievement standards must include: (1) standards aligned with the state's academic content standards; (2) describe two levels of high achievement (proficient and advanced) that determine how well children are mastering the material in the state academic content standards; and (3) describe a third level of achievement (basic) to provide complete information about the progress of lower achieving children toward mastering the proficient and advanced levels of achievement. 20 U.S.C. § 6311.

[117] 20 U.S.C. § 6311.

[118] Adequate yearly progress must be defined in a manner that: (1) applies the same high standards of academic achievement to all public elementary school and secondary school students in the state; (2) is statistically valid and reliable; (3) results in continuous and substantial academic improvement for all students; (4) measures the progress of public elementary schools, secondary schools and local educational agencies and the state primarily based on yearly academic assessments of student ability; (5) includes separate measurable annual objectives for continuous and substantial improvement for: (i) economically disadvantaged students; (ii) students from major racial and ethnic groups; (iii) students with disabilities; and (iv) students with limited English proficiency.

[119] The report card must be publicly disseminated to all schools in the school district served by the local education agency and to all parents of students attending those schools in an understandable and uniform format and, to the

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extent practicable, provided in a language that the parents can understand. The report card should also be made widely available through public means, such as posting on the Internet, distribution to the media, and distribution through public agencies.

[120] The NCLB Act required LEAs to provide notification to parents of the quality of the schools based on prior rankings.

[121] The NCLB Act mandates that all schools funded under the act have a "highly qualified teacher" in every classroom. Highly qualified is defined in the NCLB Act as a teacher with teaching credentials, but the NCLB Act allows states to impose additional requirements in their NCLB Act Plans.

[122] Restructuring alternatives that LEAs may consider include: (1) reopening as a public charter school; (2) replacing all or most staff; (3) allowing third party (public or private) with a proven track record to operate the school; and (4) operation of the school by the State.

[123] As a result, all non-fully credentialed teachers must complete all certification requirements by 2005-2006, or risk losing their job.

[124] In one of the first lawsuits brought to enforce the teacher certification standards under the NCLB Act, Californians for Justice sued the California Board of Education and Department of Education in San Francisco Superior Court for defining "highly qualified teacher" as a teacher with 18 hours of coursework in the subject to be taught, but not requiring credentials. *State Faces Lawsuit Over Teachers' Qualifications*, THE SAN FRANCISCO CHRONICLE, Jan. 24, 2003.

[125] The NCLB Reading First State Grant program will make 6-year grants to states, which will make competitive subgrants to local communities. Local recipients will administer screening and diagnostic assessments to determine which students in grades K-3 are at risk of reading failure, and provide professional development for K-3 teachers in the essential components of reading instruction. The new Early Reading First program will make competitive 6-year awards to LEAs to support early language, literacy, and pre-reading development of preschool-age children, particularly those from low-income families. Recipients will use instructional strategies and professional development drawn from scientifically based reading research to help young children to attain the fundamental knowledge and skills they will need for optimal reading development in kindergarten and beyond.

[126] Although no private right of action is specifically granted in the NCLB Act, lawsuits that have been filed to date rely on an "implied right" of action theory.

[127] Times Union, *Federal School Act A Possible Litigation Magnet* (Feb. 13, 2003).

[128] *Id.*

[129] *State Faces Lawsuit Over Teachers' Qualifications, supra* note 124.

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